

SWIMMING IN THE DEEP END: DEALING WITH JUSTICE IN MEDIATION

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I. INTRODUCTION

Justice is a troublesome issue for mediators. It is not their role to decide who was right and who was wrong. Mediators have no authority to determine if a resolution is fair or just. That role and that authority are reserved for judges, juries, and arbitrators. But if mediators should not decide what is fair and just, why should they even think about those matters? Even learning only what the parties deem fair or unfair about past actions, or what is just or unjust about pending settlement proposals, without trying to impose any “correct” outcome, would leave the mediator with useless knowledge. How could it help the parties reach an agreement? And it would leave the mediator frustrated. If mediators were to allow themselves to develop their own sense of what is fair and just, they would either have to squelch that opinion or try to get the parties to act in accordance with it. Burying their opinions would lead to frustration and a nagging sense of internal discord. But if they try to get the parties to adopt their view, the resulting agreement would become that of the mediator, rather than the parties.

While some version of the foregoing aversion to justice is common among mediators, it is not my view. This article is an effort to test the aversion to justice that I think is so prevalent. Rather than avoid the question, I think mediators should be more willing to pay attention to justice in mediation. They should develop their skill at using justice, just as they develop their other mediation skills. Such a skill is important to improve the profession of mediation, as well as to protect the independence and autonomy of the parties. The waters look deep at the justice end of the mediation pool, but mediators should learn how to swim in them.

For purposes of understanding what mediators do, justice might more easily be understood as “fairness.” Common sense

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ideas of fairness are never far from our thoughts. Such ideas may form a prominent part of our conscious reactions when we assess a person's past actions or future plans. These common sense ideas may lie dormant, as potential ideas helping to make sense of other things that we discuss. While, sometimes, an explicit invocation of fairness seems appropriate, at other times it seems overdone. Of course, ideas of fairness often surface in conflict situations. Each party is conscious of the perceived unfairness of the other party's past actions and future plans, and conversely aware of the fairness of its own actions and decisions. Even when a mediator does not have an opinion about the fairness of the parties' actions and proposals, the large moral vocabulary of fairness is easily accessible to any mediator who wants to discuss the issue. Indeed, I suspect that inchoate ideas about fairness shadow much of a mediator's thinking about what the parties are saying. The mediator's effort to remain unbiased and neutral sometimes becomes a conscious effort to put aside his or her own opinions about fairness.

This informal sense of justice - justice as fairness - might seem inappropriate as an answer to the question of justice in mediation. The term "justice" more likely connotes the kind of justice that is debated and enforced in the judicial or political systems. There, justice rests on the various sources of legal standards, such as legislation, regulation, and legal opinions. In the case of the judicial system, justice rests on the systematic application of law to fact that occurs through the system's procedural rules and practices. But those differences do not negate the usefulness of justice in considering substantive fairness in mediation. The more formal sense of justice is similar to the common-sense idea of justice and fairness that I discuss here. The formal and the informal senses substantially overlap. When pressed for justification, both formal justice and common-sense fairness can draw on similar principles or moral standards. These include such basic questions as imposing punishment, requiring reparations in fair proportion to the wrong that was done and to the wrongdoer's degree of responsibility, and creating an equitable distribution for contested things of value. The legal system, of course, contains much greater elaboration of these concerns than does our informal sense of fairness, but the same, or very similar, concepts animate both. Dealing with fairness in mediation in a sound manner requires mediators to engage in the same kind of moral reasoning that is needed for an analysis of justice. From a mediator's point of view, fairness and justice are similar

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enough to support the use of the term “justice” to describe the inquiry.

Once we clarify that “justice” includes common-sense ideas of fairness, it becomes easier to see why we should pay attention to how mediators deal with it. Fairness is part of the ordinary backdrop of concepts against which we conduct many of our charged or contentious debates. Thoughts about fairness are always available to become part of the discussion. This inevitably leads us to a meta-fairness question: When should we include fairness in our attempts to resolve conflicts and in what circumstances? A decision to exclude certain fairness questions from a mediation session is itself a question of fairness, and must be justified as such.

This article discusses two questions: First, whether and how the parties and the mediator deal with their own senses of justice and fairness as they mediate; and second, how and why the mediator should permit or encourage ideas of fairness and justice in the mediation conversation.

First, I will describe two incidents that occurred in actual mediations. These incidents seem rather common, and one might not initially think that they raise significant questions of fairness or justice. Nevertheless, I will discuss the ways in which questions of fairness and justice are implicit in them.

After addressing the fairness dimensions, I will address the various ways a mediator could deal with these issues. A mediator has many options. He or she could exclude them from discussion by saying, for example, “we’re here to compromise and settle this dispute in an expeditious manner, not to debate fairness and justice.” Or, he or she could permit the parties to explore issues of fairness and justice if the parties chose to do so, on their own, saying, for example, “you’ve brought up the issue of fairness. Do each of you want to talk some more about that?” The mediator might also suggest that the parties consider fairness, saying, for example, “I think it might be useful for each of you to talk more about fairness.” Furthermore, a mediator could even offer his or her own opinion about the fairness and justice regarding the dispute or about possible resolutions, saying, “that demand seems much too big for the harm you said you have suffered.”

Discussions of justice may threaten the parties’ autonomy. The mediator may lead the discussion in such a way that the solution becomes the mediator’s view of what is fair and just, regardless of what the parties think. I will conclude by suggesting that this danger, though real, is exaggerated and not inevitable. Protec-

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tion of the parties' autonomy lies in the kind of moral reasoning the mediator uses, and the extent to which the mediator frames discussions about fairness more as dialogue than as logical command. Mediators, who use a form of moral reasoning that relies on richly textured descriptions of particular situations, replete with analogies and factual distinctions, reduce the risk of imposing a result that the parties do not desire or are not willing to adopt. Mediators are not judges. Their own positions on justice and fairness are not privileged over those of parties. Mediators may only facilitate communication. On questions of fairness and justice, they have no more authority to command the parties than the parties have over each other. Differences about what is fair stem from different perceptions about the facts, different expectations for the future, and different experiences and assumptions about what people are like, and not from differences about abstracted logic. Mediators lack the moral privilege to impose their opinions of what is right or wrong, in terms of past facts, future expectations, and assumptions about people, on the parties. Considerations of fairness and justice can be appropriate in mediation when the discussion of those matters becomes a triangular one between three equally independent parties, the mediator being one voice among equals.

II. HOW JUSTICE AND FAIRNESS HIDE IN TWO ORDINARY MEDIATION SITUATIONS

A. Situation 1: The Big Demand

The first instance arises from the mediation of an employment discrimination claim. Such a claim raises questions of reparative justice, for example: what is a fair resolution to a perceived wrong?¹ Here, a woman was discharged from her low-level clerical

¹ I mediated this matter, appointed to do so by the Equal Employment Opportunity Commission. I remember quite clearly the particular event I describe, but I do not remember many other details about the mediation. In accordance with the practices of the EEOC mediation program, I destroyed my notes after the mediation was concluded. (This is set out in the Form Agreement to Mediate used in the mediation program at the EEOC in Newark. Copy on file with the author.) I do not recall whether the matter was resolved in the mediation. Except for the events I describe, the approximate financial stakes in the matter, and the fact that the dispute was framed as an employment discrimination claim, I have made up the other details, such as particulars of the job and the statutory basis for the

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job. She filed a claim of employment discrimination with the Equal Employment Opportunity Commission (the “EEOC”), alleging that she was discharged because of her age and because she was female. The EEOC is authorized to investigate charges of employment discrimination, but has adopted a scheme of allowing the parties to try to resolve the matter by mediation before the EEOC investigation begins.² Both parties agreed to mediate.

The mediation began with the usual preliminaries, stressing the voluntary nature and confidentiality of the proceeding, and the neutral and non-adjudicating role of the mediator. With the parties present, the employee-complainant described how she had been discharged, and how she thought that this was because of her age and gender. She appeared without legal counsel or advisors. The representatives of the respondent company stated that the discharge was a result of reorganization, and suggested that the complainant’s work had not been particularly skillful or accomplished. The company’s lawyer was present, but the company representative spoke. The person who had made the actual decision to discharge the complainant did not attend. The discussion brought out some information about the kind of work the company did and the kind of work the complainant had done there. It also revealed that the complainant’s salary had been no more than \$25,000 per year.

The complainant was still unemployed, about six months after her discharge, and was receiving unemployment compensation payments. Some inquiry into her particular needs took place, but the discussion did not reveal any obvious ways in which the company could provide a high gain to her at a low cost to itself. As the discussion turned to ways to resolve the dispute, neither party was willing to suggest specific terms for settlement that would be acceptable to them. There were no demands or offers on the table.

Thinking that the company representatives were unwilling to make an offer without first receiving a demand from the former employee, but that the former employee was unwilling to make a demand directly to the company, I excused the company representatives from the room to meet privately with the complainant. After discussing the events and the former employee’s current circumstances with her, I told her that being specific about what she wanted from the company was important; however, she refused to

claim. In this way I intend to keep the confidentiality of the process and the privacy of the parties.

² The program is described at <http://www.eeoc.gov/mediate/index.html> (last visited Aug. 2, 2004).

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say what she wanted. I believe that she expected that by attending the mediation, the company would make her a satisfactory offer that would settle the matter. When the company did not make her an offer, she had no sense of what should happen next. We reviewed the amount of wages and benefits that she had lost,³ the amount of unemployment insurance that she had received,⁴ and how long we expected it would take her to find another job.⁵ She did not use any of these specifics to put together a settlement demand. She did not appear to be particularly angry at the way the company or any specific person in the company had treated her; neither she, nor I, suggested that an apology from the company should be part of a settlement.

I told her that she was going to have to make some kind of demand or settlement proposal if the matter was to be resolved. I also told her that the company was expecting her to make the first demand, since she was the person who had brought the charge, and that if the company were to make the first offer, it would probably be minimal. She still refused to express any particular terms to resolve the matter, or even to start bargaining.

Trying to develop some specifics that we could use to get a settlement discussion going, I started to construct the financial terms of a possible demand. Noting that her net losses and loss of some future income came to something less than \$10,000, I asked what she would think of settling for that amount, or demanding it as part of the negotiation. She didn't like the idea. I suggested \$20,000, indicating (but probably not very explicitly) that she might make that her negotiating demand, with the expectation that the company, if it agreed, would settle for something less. She didn't like that idea either, and was unwilling to make such a demand. I kept going. To the extent our conversation could be seen as a negotiation between her and me about what she would demand, I was

³ Title VII and ADEA provide a "make whole" remedy, including the back pay that the employee lost by reason of the employer's discriminatory conduct. 42 U.S.C. §2000e-5(g)(2004). While the acts also authorize a court to order the employee to rehire the wrongfully discharged employee, reemployment is relatively rare as a court-ordered remedy or as part of a voluntary settlement.

⁴ When back pay is awarded as part of a judgment, the amount is not reduced by the amount of unemployment insurance received. *See, e.g.,* *Gelof v. Papineau*, 829 F.2d 452 (3d Cir. 1987). In mediated settlement negotiations, however, in my experience, unemployment compensation frequently offsets lost salary. The most salient measure of negotiated damages is the actual dollar loss.

⁵ Employment discrimination law requires a wronged employee to take reasonable steps to mitigate damages, by such means as seeking other employment. *See, e.g.,* *Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989).

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bidding against myself. She seemed as unwilling to state specific terms to me as she was to the company. Not seeing any other avenue to keep the mediation going, I took a plunge and asked whether \$50,000 was an acceptable number. It was! Her eyes lit up and we agreed. Now I could start talking to the other side.

A mediation coach might advise me that I was wrong to pitch a series of numbers to the former employee, waiting to see which one she would swing at. That procedure overemphasizes settlement by numbers, rather than trying to find value-added ways to meet the parties' real interests. It might also seem too manipulative, trying to influence her to state a demand even though it seemed important to her to let the employer make the first offer. A review session with such a coach would be interesting, and maybe I could find other ways to have handled the situation.

But the unusual method by which we created a bargaining number in this case should not detract from the main point. It is the size of the demand, not the unusual way in which it was created, that I find significant for this discussion of justice. Even without prodding or suggestions from the mediator, many claimants in a mediation start with very big demands, demands that seem out of proportion to what they could reasonably expect to achieve through litigation or simple negotiation. Why they make such demands, and the extent to which such demands embody their concern for fairness and justice, remain key questions. Perhaps my experience with this claimant made the question of fairness and justice more apparent to me. Since I was able to observe how the demand was created, I was left wondering why that particular number had done the trick.

I don't remember if we resolved the matter. If we did, it was for substantially less than \$50,000, and with terms that were primarily limited to the payment of a sum of money.⁶

Why was that demand acceptable? On its face, a \$50,000 demand seems to have little to do with justice or fairness. The amount was not tied to her actual dollar losses or anticipated future loss of income. In fact, at about double her annual income it

⁶ Settlements at the EEOC in New Jersey typically include, in addition to the payment of money, a release of all the former employee's claims against the company, a confidentiality agreement that prevents the former employee from disclosing the terms of the settlement, and a promise by the company to give a "neutral reference" to prospective new employers who inquire, consisting only of job title and dates of employment, and salary if asked. While that is typical, many settlements include other terms, such as changes in job duties or supervision if the complaint is brought by a current employee, or payments made over time that cease if and when a former employee finds other work.

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seemed something like a windfall. The large amount, and the almost gleeful sparkle in her eye when she heard the number, suggests a variety of possibilities. Perhaps she had heard stories of people obtaining very large settlements for wrongful firings, and the stories “anchored” her expectations at such a high number.⁷ Perhaps she was an optimist who went through life seizing great opportunities as they came her way, but not thinking very hard about what she deserved, or how to get what she wanted. Here was an unexpected opportunity; she sought to take it. On the other hand, perhaps she was a pessimist who never expected anyone to do anything good for her. The \$50,000 offer may have been large enough to crack her pessimism. Perhaps she had a highly positional, competitive approach to negotiation and conflict resolution, expecting that the only way to get something was to make an extremely large demand, and then expect to make concessions.⁸ The list of possible reasons could be substantially extended.⁹

There could have been a justice-based rationale to her actions, as well. She might have thought that her discharge was so unfair and so hurtful that anything less than \$50,000 would not have been a fair rectification for the wrong done to her. This is a form of reparative justice.¹⁰ Her sense of fairness required such a sizeable settlement. I suspect her sense of fairness had something to do with the disinterest she showed in any proposal less than \$50,000, and the way her tone brightened when I proposed that number. That was the number that finally began to seem fair to her. I do not think that her sense of fairness and justice are the sole explana-

⁷ See HOWARD RAIFFA ET AL., *NEGOTIATION ANALYSIS: THE SCIENCE AND ART OF COLLABORATIVE DECISION MAKING* 34 (2002). See also Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107 (1994) (describing the anchoring effect and reporting how it influenced the willingness of law students to accept a settlement offer in a simulated negotiation).

⁸ See ROBERT MNOOKIN, ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 24 (2000) (describing extreme bargaining claims as a “hard bargaining” tactic).

⁹ As an example, she may have thought that the company had an unusual and special reason to fear the EEOC investigation that would follow the failure to settle the case at mediation, a reason that would lead them to pay a large bonus to her to stop the case at this early point. Or she may have had no sense of the give and take of the negotiation process, or how to handle one’s demands in a way to maximize the amount the employer was willing to give.

¹⁰ The key distinctions in types of justice made by Aristotle – reparative, distributive (or allocative), and procedural – are still useful today. See Morton Deutsch, “Justice and Conflict,” in MORTON DEUTSCH & PETER T. COLEMAN, EDs., *THE HANDBOOK OF CONFLICT RESOLUTION* 41ff. (2000). In this article, I discuss only the substantive ones, reparative and allocative, and not the elements of procedural justice.

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tion of how we found a number to bargain with. She may well have been under a misapprehension of the chances of winning through an EEOC investigation, her expectations may have been unrealistically anchored, and so on. But her sense of fairness could have worked in a way consistent with these other factors, all coming together at the point where we found the number that was right for her.

All of this is complete speculation on my part. I did not know her well enough, nor did I take the time to get to know her well enough, to understand why the \$50,000 offer seemed so different, to her, from the smaller numbers.

That brings us to a key question for this analysis. Should I have spent the time to learn more about why she took to this demand? There are numerous reasons why I could have done this, reasons that have little connection to justice and fairness. Most are practical in the sense that they would provide information that could help us find mutually acceptable terms for resolution. For instance, if I learned the reasons for her demand, I could assess the chances that she might concede and thus estimate whether a common, acceptable settlement range existed within which the parties could reach agreement. If I learned that her demand came from anchoring herself to an unreasonably high expectation, I could try to loosen the anchor. If I learned that she negotiated with a highly competitive and positional strategy, which could inadvertently cause a negotiating stalemate that neither side wanted, I could help her modify the style to overcome this particular strategic barrier to agreement. If I learned that she had little sense of how to negotiate effectively in this situation, I could provide guidance.

These reasons for inquiry make sense if my role as a mediator is to try to increase efficiency for both the sponsoring agency and the parties by lowering the cost and time to bring the case to resolution. They also make sense if my role as a mediator is to help parties overcome barriers to agreement that they are unable to overcome alone, barriers such as faulty information, mistaken expectations, distorted thinking, and self-limiting negotiation behavior. The efficiency rationale could put me somewhat at odds with the parties, since the agency's efficiency interests might conflict with the parties' wishes or the sense of what is efficient for them. The second rationale – overcoming the parties' own barriers to agreement – still keeps the parties' interests paramount.¹¹

¹¹ The latter reasons even make sense for a mediator who uses a transformative approach. Under this approach, getting an agreement, or even helping the parties to reach

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Thus, there are substantial reasons why good mediation technique would lead me to delve into why the \$50,000 demand seemed right to the former employee. But, if the inquiry is appropriate for reasons apart from justice, why should it be less appropriate to inquire into the sense of the fairness and justice of her demand? Questions about the parties' views of fairness and justice are not so qualitatively different from questions about their negotiation dynamics, about their tangible and economic interests, or about their thinking processes – the everyday “stuff” of mediation work – that they should be ignored.

If I were trying to understand the complainant's justice-based reasons, my questions would be somewhat different from those aimed at overcoming barriers to agreement or empowering her to act more effectively for herself. I could have directly asked what seemed “fair” about \$50,000, or, perhaps, asked instead why a lesser amount seemed “unfair.”¹² I could have discussed the elements of fair recompense provided by the law, such as back pay and some front pay, and asked why they seemed inappropriate to her. Or, I might have intuited that something about the way she had been treated made her feel she needed something more than a moderate amount of economic compensation to repair the damage. I could then have asked for more details about the events that loomed as so unfair in her mind.

When we unmoor fairness and justice from the standards and remedies provided by the law, the scope of relevant events and relevant issues becomes much more expansive. For instance, the complainant may have felt unjustly treated in any combination of the following respects, to name a few:

- If she had been discharged because of her age or her gender.
- If she had been discharged because a supervisor simply did not like her.

one, is not the purpose of a mediator's work. Instead, the mediator seeks to increase the extent to which the parties understand each other's circumstances, attitudes and needs (so-called “recognition”) and the effectiveness with which they can understand their own circumstances, attitudes and needs and act to satisfy them (so-called “empowerment.”). See Robert A. Baruch Bush & Sally Ganong Pope, *Changing the Quality of Conflict Interaction: the Principles and Practice of Transformative Mediation*, 3 PEPP. DISP. RESOL. L.J. 67 (2002) (seeking accurate information and reducing distortions in the parties' thinking serves both the recognition and empowerment tasks. Understanding their negotiating behavior to help them be more effective negotiators empowers them.).

¹² It is often easier to recognize unfairness and injustice than to say when something is fair and just.

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- If she had been discharged without being given notice of the reasons and an opportunity to discuss those reasons, and whether she could change her conduct to still be of use to the company.
- If she had been treated differently from other employees without any statement of the reason.
- If she had been treated in a summary and, according to her, arbitrary fashion.
- If she had not been given any reasons when she was discharged.
- If the employer had not tried to take account of her needs when they decided to discharge her.

Moreover, once we have separated them from the formal confines of the law, justice and fairness can easily become issues for both parties. A big demand from a complainant might seem very unfair to the respondent, even though the law does not recognize such demands as legally unjust.¹³ Various ways in which her conduct could have seemed unfair include the following:

- If she had filed a charge with the EEOC with no plausible reason, except to get money.
- If she had not spoken up in a timely manner when the employer was criticizing her work, or when it made its decision to discharge her, thus depriving the employer of an opportunity to explain and justify its actions.
- If she had begun to work without the energy or commitment they expected from her.
- If she had been “difficult” on the job for no good reason.

Revealing and working through the broad range of unfair actions that be might be relevant would require some detailed exploration by the mediator. Moreover, the foregoing reasons only concern past unfair events; they do not address the related but distinct question of what actions would constitute a fair degree of reparation for the wrongs done.

B. Situation 2: Splitting the Difference

My second example comes from a journal that a law student wrote in a mediation class I taught, describing a case he mediated

¹³ The only exception would be if she submitted a frivolous charge, in which case she might be liable for the employer’s attorneys fees spent in defending itself. *See* *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

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in a New Jersey Small Claims Court.¹⁴ In contrast with the first example, above, it raises questions of allocative justice, the fair division of available resources. As with the first example, I provide no details about the mediation except for the incident that raises the justice question. In the mediation reported by the student, the parties had described the dispute and had each made demands and offers. With a claim of no more than a few thousand dollars, less than five hundred dollars separated them. The student suggested they split the difference. They refused, and the matter was left unresolved.

This is, of course, a typical situation. Splitting the difference between a demand and an offer often resolves claims. The negotiation literature points out that negotiations tend to resolve mid-way between the first “real” offer and the first “real” demand.¹⁵ Such resolutions seem to be part of the structure of the positional aspects of negotiation, an exchange of concessions ending in the middle.

But splitting the difference is not simply characteristic of negotiation dynamics. It also expresses an aspect of fairness and justice. It is an instance of the justice principle of equality. The gap between the offer and the demand is a resource that the parties are seeking to divide, each trying to get as much as possible. Dividing it equally between them is one way to make the division fair. In asking them to split the difference, the student mediator was invoking a principle of fairness.

The principle of equality or equal division is not dispositive. The parties’ wishes and attitudes can affect or interfere with the application of the principle. For instance, they may want the other side to acknowledge that they were not at fault and the other side was. They may want the other side to give up more than half of the available resources as an implicit concession that the other side was more at fault. They may not think that splitting the difference between the last offer and the last demand is an equal distribution, since they may be focusing on an earlier demand or offer and measuring equality by that. They may not want to focus on the dollar amount of the concession, but its proportionate effect on each

¹⁴ Among its various court-annexed mediation programs, New Jersey provides that people with specified training may mediate cases that are brought in its small claims courts. New Jersey Rules of Court, 1:40-7(a). In the mediation class I teach at Rutgers Law School, Newark, I provide the requisite training and then place some students as mediators in small claims court.

¹⁵ See RAIFFA, *supra* note 7, at 114.

side's position; splitting the difference between a \$2,000 demand and a \$1,000 offer with a \$500 concession from each side is a 50% increase in the offer, but only a 25% decrease in the demand.¹⁶ While the idea of equal division seems straightforward in principle, its application can become quite complex. In addition to the kinds of attitudes or strategies just discussed, the parties may disagree on what division is really equal. The "I cut, you choose" method of dividing one thing in two parts is a simple way to overcome fears of cheating and uncertainties as to the actual size of one half. When more than one simply dividable object is involved, it may be necessary to develop complex procedures to assure the contestants that the division is equal.¹⁷

The fairness of splitting the difference is complex for another reason as well. It is not the only principle of just allocation. Equity and the needs of the parties are competing justice principles that might lead to a different allocation than simply splitting the difference. The disputants in this case may have rejected his proposal to split the difference in their positions because they thought it would have been more *equitable* to make a different division based on the degrees of fault, for instance. They may have thought that their side had a greater *need*, thus justifying a larger share of the available resources. When the mediator asked whether they would split the difference, he was only proposing one concept of distributive fairness and not considering the others.¹⁸

We can imagine a variety of reasons why the mediator's suggestion to split the difference did not result in an agreement. As I

¹⁶ Other dynamics in the negotiation may make it difficult for the parties to split the difference themselves, even if they might think it is fair. Strategic considerations may keep one party from suggesting such a resolution, for fear that the other side will take advantage of the offer by using the amount resulting from the split as a new position from which a further concession might be extracted. The negotiators' self esteem may keep them from offering to split the difference, fearing that it would be taken as an implicit concession of fault. The student mediator neutralized these obstacles by himself suggesting that the parties split the difference.

¹⁷ Steven Brams and Alan Taylor have developed an elaborate set of procedures for making fair and envy-free divisions, called "adjusted winner," requiring each side to assign scaled values to a variety of things to be divided, and then distributing the various goods so that the resulting points come out evenly. See STEVEN J. BRAMS & ALAN D. TAYLOR, *THE WIN-WIN SOLUTION* (1999).

¹⁸ A sense of allocative justice may have been operating in the employment discrimination matter described above. When the former employee seized on \$50,000 as a proper settlement demand, she may have been thinking that she was poor and her former employer was a wealthy corporation that could easily afford such a generous settlement. In doing so, she would have been drawing on a social justice principle to redistribute society's wealth more equally.

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have noted, many of these reasons relate to the interactive dynamics of negotiation. The suggestion may have been too early, it may not have taken sufficient account of other factors that were preventing the parties from reaching an agreement, or the parties may have been thinking too strategically. But the fairness issue may have also played a part. Splitting the difference may not have seemed sufficiently fair to the parties.

Asking the parties whether they would split the difference necessarily puts the mediator in the position of discussing fairness. When the student mediator suggested splitting the difference, he was implicitly saying that he thought such a division would be fair. In this way, a question of allocative fairness becomes an explicit part of the mediation discussion, while the issues of reparative fairness, such as the problem of setting a negotiation demand, can remain hidden, implicit, or even absent.

However, a mediator who asks about splitting the difference faces the same justice issue as the mediator who asks a party to make a demand or offer: how far should the mediator inquire into the fairness of the parties' statements? Although a mediator who brings up splitting the difference raises a fairness concept in a limited way, he or she still must choose whether to inquire further about the fairness or justice of the matters under discussion. The "split-the-difference" mediator could try to find out whether a party was rejecting the proposal because it did not satisfy that party's sense of equity or need. He or she could then dig even deeper to try to understand what it is about the situation and the proposal that, in the party's view, keeps it from being sufficiently equal, equitable, or responsive to need.

This line of inquiry takes the mediator to the next fork in the road. The mediator may find that the party's view of the fairness of the proposed allocation makes no sense. Given a choice, the mediator may come to a different conclusion; the mediator might not even understand how a person in the party's situation could make the judgment about fairness that the party did. Should the mediator then start a conversation about their differing views of fairness?

III. WHY MEDIATORS SHOULD *NOT* TALK ABOUT FAIRNESS

I think mediators should be willing to engage in a non-directive discussion of fairness. But before describing how and why that

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can be done, I would like to review what I take to be the key arguments against such mediation work.

A. Imposing the Mediator's Views

The most apparent objection to asking the parties about their views of fairness and justice is implied: Asking about these issues may be the precursor for the mediator to inject his or her own views about fairness and justice. If the mediator starts voicing his or her own views, the inevitable next step would seem to be abandoning neutrality and taking sides, preferring the disputant whose views are most like those of the mediator. This slippery slope could fall even lower, with the mediator trying to force, or at least strongly influence, the parties to abandon their own views and act in accordance with those of the mediator. Such an intervention by the mediator would add insult — disrespect for the parties' autonomy — to injury by implicitly taking sides.

Protecting the autonomy of the parties from intrusion by the mediator is a fundamental ethical precept of mediation practice. Because neither the law nor the parties have given the mediator the power to decide the dispute, the parties' ability to keep the decision in their own hands remains paramount. The ethos of mediation only permits mediators to intrude on the parties' autonomous decision-making power to prevent harm to others, and even here such intrusion is highly controversial. Examples include settlement of environmental disputes,¹⁹ product liability matters where the parties agree to keep the details secret and out of the hands of public authorities or other persons who may be harmed,²⁰ and terms in a family custody matter that seem good for the parents but not for the children. In such situations, the mediator must decide whether to intervene to protect the third parties in some way, such as counseling the parties to modify their agreement, or refusing to continue mediation, or disclosing the planned wrongful conduct. When harm to others is not an issue, the dilemma evaporates and there seems to be no good reason to question the as-

¹⁹ See Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85 (1981), see also Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981).

²⁰ See Jack B. Weinstein & Catherine Wimberly, *Secrecy in Law and Science*, 23 CARDOZO L. REV. 1 (2001) (discussing how expert witnesses and others should deal with such secrecy).

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sumption that the mediator should stay far away from the parties' freedom of thought and action.

Sometimes the conflict between protecting a party's autonomy and protecting others arises wholly within the mediation, without regard to absent third parties. An example is the familiar problem of power imbalances between the parties. When one of the parties has private information that gives him or her a negotiating advantage, or has advantages of wealth, gender, culture, personality, or has better negotiating skills,²³ a strict respect for the parties' autonomy should preclude the mediator from intervening. Respect means that the mediator takes the parties as they come, imbalances of information, skill, and life circumstances included. Despite this, in some of these circumstances it may be appropriate for the mediator to intervene. But intervention is only to protect the ability of the weaker party to make a more informed, better-considered decision, to permit that party to take action in a more voluntary and rational way. The intervention is justified by the need to protect and enhance the autonomy of the disadvantaged party, even if it somewhat limits the freedom of action of the other.

Out of this deep respect for the parties' autonomy, only protecting or enhancing the health, safety or autonomy of others – including one of the parties – justifies the extreme step of interfering with their freedom of thought and action.

B. A Waste of Time

The second objection is that inquiry into fairness and justice would be fruitless, and a waste of time. This objection rests on the idea that questions of substantive fairness and justice are purely personal and subjective.²¹ Because they are personal and subjective,

²¹ When judges, juries or arbitrators use established law to articulate what is fair and just, and do so through procedures that painstakingly search for accurate accounts of the relevant facts, fairness, and justice can have a kind of objectivity that they lack when we look only to the views expressed by the parties in a negotiation or mediation. Of course, there is a long tradition of questioning the "objectivity" of adjudication, arguing that it does not occur because of imperfections in the system of adjudication, or even that it can never occur because the concept does not accurately describe the world. *See generally* MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987). Even people who reject such skeptical views, and who believe that fairness and justice are sufficiently objective when they appear in our systems of adjudication, tend to see the divergent views expressed by people in conflict as merely subjective, rather than the considered objective judgment of a non-involved neutral party.

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tive, they cannot be changed any more than one's tastes about ice cream or alternative rock music. If they cannot be changed, spending time on them would produce no results and would take time away from the kinds of discussions and mediator interventions that could increase the likelihood of agreement, or a better agreement. Even worse, spending time on something that seems so fruitless could become no more than mediator voyeurism.

Under this view, the parties' ideas of fairness and justice differ qualitatively from the other kinds of ideas and perceptions they bring to the mediation. The other kinds can be changed. As a result of mediation, for instance, the parties may change their predictions of what would happen in court if the matter were not voluntarily resolved, what tangible benefits would flow their way from a proposed settlement, or what additional negotiating concessions the other side is likely to make. Such changes can result from learning additional facts about the objective world, such as the evidence supporting the claims, the latest law, or the parties' financial circumstances. They can result from learning facts about the parties themselves, such as their taste for conflict and the degree to which they can tolerate risk. But, unlike this kind of factual and predictive information, it is assumed that personal, subjective views of justice and fairness cannot be modified by additional facts.

Similarly, a mediator can help resolve a matter by identifying and counteracting various distortions in the parties' thinking processes, for example, from expectations that are "anchored" to some inaccurate perception, or arise from examples that arbitrarily happen to be salient and available, from reactive devaluation of settlement proposals made by the other side, or from the tendency to refuse an offer if it is seen as a "loss," even if one would take the same offer if it were seen as a "gain."²² These thinking processes are not "objective" in the way that facts are, but, because they are labeled "distortions," they presume that there is a different, more objective state of understanding that a clear-thinking party could appreciate if the distortions were to be wiped away.

Intervening to clear up "distortions," however, is useless for questions of fairness and justice. A person's personal and subjective views of fairness and justice are by definition completely "true." There are no cognitive distortions for the mediator to try to correct. Any attempt at "correction" threatens to impose the mediator's "personal" views of fairness and justice on the parties.

²² See MNOOKIN, *supra* note 8, at 156 *ff.* (describing how thinking processes interfere with rational judgment in negotiation).

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C. Throwing Fuel on the Fire

Inquiring about fairness and justice might also be thought to be bad mediation because it might intensify the conflict between the parties. Claims of unfairness and injustice are often part of the vocabulary of conflict. Each side clearly sees the fairness of its actions and its own proposals, and sees just as clearly the unfairness of the other side's actions and proposals. We usually talk about fairness and justice by using a binary kind of logic; if something is fair, what is opposed to it must be unfair.²³ This means that any claim by a party that he or she acted fairly implicitly charges the other party with having acted unfairly. Similarly, when a party characterizes his or her settlement proposal as fair, he or she is insinuating that the other side is seeking something unfair. Such implicit charges are powerful. Both parties probably agree that it is wrong for someone to act unfairly. The parties may disagree about what is unfair, but they will usually agree that the principle of fairness should apply. The party who is the object of the claim of unfairness may need to defend against the imputation, rather than focus on ways to meet his or her interests and resolve the conflict. Claims of unfairness, whether explicit or implicit, can elicit additional fairness issues. A claim of unfairness may be seen as an unfair claim itself, as the employer in the example given above of the large settlement demand may have thought the complainant was unfair for bringing such a far-fetched charge. Moreover, claims and defenses about fairness are often linked with anger, or at least strong feelings, so a discussion of competing claims of fairness and unfairness can distract the parties from discussing other aspects of their dispute, and can elicit feelings that interfere with reasonable problem solving.

D. Intruding on the Parties' Privacy

Even if a mediator does not try to force a party to accept his or her idea of what is fair and just, simply raising the question might be seen as an improper intrusion on that party's autonomy: Personal moral views about what is fair and just lie at the heart of

²³ It is rather unusual for people in conflict about the fairness and justice of their actions to understand that both were acting fairly. A neutral, such a mediator, might be able to see some fairness and justice on each side, but it would probably take a lot of mediation work for the parties to come to a similar understanding.

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our sense of personhood. Suggesting that those views are open to question and reconsideration might be seen as an effort to change something that is very basic to a person's identity. Under this objection, such suggestions would be off limits to a mediator.

Typically, mediators make suggestions for discussion topics, advise further negotiation steps, ensure that the parties understand each other, suggest, or help the parties develop, new, mutually beneficial ideas for resolution, and offer advice about possible time, expense, risks and outcome of pending litigation or continuing the dispute. These matters are largely fact-based, and not automatically value-laden. Unlike questions of justice and fairness, those matters refer to the kinds of knowledge we share with each other. Asking someone to consider new facts, and/or take action on the basis of that consideration does not challenge one's personhood or autonomy. On the contrary, consideration of such matters is part of enhancing the parties' rational thought. Unlike inquiry into moral views, asking someone to think once again about facts supports, rather than undermines, his or her autonomy. As with the foregoing objections, this one also rests on the assumption that questions of justice and fairness are categorically different from more "factual" matters, and discussion threatens the parties' autonomy in a way that discussion of factual matters does not.

IV. WHY MEDIATORS *SHOULD* TALK ABOUT FAIRNESS

The foregoing objections are overdrawn. First, mere talk about fairness does not necessarily create undue mediator influence. Second, even if talk of justice and fairness does not help pave the road to agreement or lead the parties to change their minds, it can be valuable regardless of any effect on the outcome. Third, mediators should be able to handle any tension or strong feeling elicited by a discussion of fairness and justice. And fourth, discussion of fairness and justice, even if it involves the personal views of the mediator, is not necessarily a threat to the parties' autonomy. The key question is not *whether* matters of justice and fairness become part of the mediation discussion, but *how*.

I discuss these responses in more detail below. But first I will consider why we should even want to oppose or limit the objections and why it might be important for these issues to be part of mediation.

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We can start with a thought experiment. Assume that a mediator has successfully arrived at two settlement proposals. Each side sees *both* proposals as equally acceptable; both of them provide a better outcome to each side than the alternative of continuing the dispute and seeking an alternative way to resolve it. The two proposals could differ in a variety of respects. One might provide for payment over time, while the other provides for a larger cash payment right away. One might provide for a continuing relationship between the parties, which both parties value, while the other provides more resources to help one of the parties develop different opportunities. When all the pros and cons of each are considered, there is nothing to make one preferable to the other. How should the parties decide between them?

The mediator might ask a variety of questions to help articulate the parties' needs, perceptions, and wishes, and thus help make a sound choice. These might include the following: "Which will provide you more income?" "Which will give you more ability to go into the future in the direction you want?" "Which will be better for your relationship with X and how important is that to you?" "Which will allow you to sleep better at night?" All of these relate to both material and to affective benefits, to material things of value the parties might gain, and to emotional satisfaction they might achieve. None, however, deal with the parties' sense of fairness or justice.

Let us assume further, that, after this inquiry, the two proposals still seem equally valuable; there is no obvious way to choose. What if one of the proposals seems fairer to one party than it does the other? That would be a good reason to prefer that proposal. By adopting that proposal, the party obtains more fairness (and justice). Further, the other party is no worse off, since both proposals were equally valuable. The argument for choosing the "fairer" proposal would be even stronger if *both* parties see it as more fair and just.

This possibility tells us the next question for the mediator to ask: "Does one of these proposals seem fairer and more just to you?" The mediator has now put his or her toe in fairness waters. This question could lead to deeper inquiry into the question. If the party says one solution seems fairer, the mediator might want to know what makes it seem fairer. Once that is understood, there may be ways to increase its fairness. If the party says that both seem equally fair – or, more likely, seem equally unfair – the mediator could try to learn more about what the party is thinking. Per-

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haps one of the proposals could be modified, at no loss to the other side, to make it fairer for the first party. The mediator's entire foot is now in fairness waters.

So far, these questions have been limited to determining what the parties think is fair and just. But the mediator cannot effectively talk about these matters and learn what the parties think of them without drawing on his or her own sense of fairness and justice. Our concepts of fairness and justice, whatever else they are, are part of our ordinary moral discourse, and operate in a complex web of shared and differing views. We only recognize the moral claims of others, whether we agree with them or not, by thinking about them in terms of our own moral frameworks. Mediators need to draw on their own concepts of fairness and justice to understand the parties' views and to help the parties use their own views more productively. Now the mediator seems to be into the fairness waters at least up to his or her knees.

Invoking the mediator's sense of fairness might seem to be going too far, but consider the alternative; if we say that mediators should *refuse* to attend to the parties' views of fairness and justice, we will be giving material interests and feelings a privileged position over a sense of fairness and justice. Put this way, the distinction seems rather odd. The mediator has made a unilateral decision to deal with only some things that are of material and perhaps emotional interest to the parties and not with others. This creates a kind of paradox for mediators. We saw above, that respect for the parties' autonomy is an overriding value in mediation, and the fear of intruding on that autonomy makes mediators reluctant to inquire into the parties' views of fairness and justice. But not paying attention to the parties' sense of fairness and justice can equally constitute a disregard for the parties. If their sense of fairness and justice is important to them, it would enhance their autonomy to weave those concerns into mediation work rather than exclude them. The task seems to be determining how to provide room for the parties' sense of fairness and justice as part of mediation work, but, in so doing, not to detract from the parties' independence and free choice.

The conclusion is that mediators should put the parties' sense of fairness and justice on equal footing with the various interests and concerns attended to by mediators. This line of reasoning simply carries into the mediation process the kinds of concerns and interests that Carrie Menkel-Meadow told us, two decades ago,

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should be part of problem-solving negotiation.²⁴ In arguing that negotiators should change their focus from the positional aspects of negotiation, such as demands, offers, gamesplaying and concessions, to the parties' underlying real-world interests, Professor Menkel-Meadow described the relevant interests broadly, to include moral interests as well as financial ones, and long-term interests as well as short-term ones. All are equal with respect to what can be the subject matter of negotiation, and the more interests that can be incorporated into the negotiation process, the more that can be satisfied by finding good resolutions. Since moral interests, including a concern for fairness and justice, are important for good negotiation, they should also be important for good mediation. Mediation, however, has not done an effective job of carrying this observation into the working ethos of mediators.

So far, this discussion has focused on the interests of the parties. I have argued that mediators should take the parties' interests as they find them, including interests in fairness and justice, and should not try to exclude certain categories of interests from mediation work. There is another reason for making a place in the mediation for the parties' views of fairness and justice, as well. It keeps mediation more congruent with the formal processes of adjudication that it often replaces. Whatever the limits and imperfections of formal adjudication may be, whether it is carried out through public court trials and appeals or through private arbitration, formal adjudication provides a benchmark for fairness and justice and is a measure of the quality of our social institutions. Mediation may not be able to "do" justice in the same way, or perhaps to the same extent, as formal adjudication. If we are to embrace mediation as a good social institution, however, it should incorporate justice to the extent it can, while retaining the distinctive characteristics that make it a valuable alternative to other means of resolving disputes. At least, we should not require mediation to purposely exclude any consideration of fairness and justice.

Of course, my thought experiment is quite artificial. It is unusual to find parties indifferent to two settlement proposals. Usually, they would find one proposal better than another for a variety of reasons, with or without regard to fairness. It also seems

²⁴ See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 *UCLA L. REV.* 754, 761 (1984) ("Is the solution 'fair' or 'just'? Have the parties considered the legitimacy of each other's claims and made any adjustments they feel are humanely or morally indicated?").

counterintuitive to imagine seeking out fairness late in a negotiation to break a tie between various proposals. A party's sense that he or she has been treated unfairly is often one of the first perceptions to arise in a dispute, not the last, and continually intrudes on and directs his or her thinking throughout the mediation. A party's other interests, such as finances, future security, and relationship, can seem more or less important or compelling depending on how consistent they are with his or her sense of fairness.

But these differences do not change the conclusion about the proper place of fairness and justice in mediation. If fairness and justice are relevant factors to break ties, they are just as relevant early on in the mediation when they are one among a number of interests that need to be satisfied. Attending to them is just as important a recognition of the party's autonomy early in the mediation as it is at the end. And the institution of mediation will be strengthened to the extent it can incorporate a consideration of fairness and justice, while remaining true to its dedication to the parties' mutual power to control the outcome for themselves. While the circumstances of the thought experiment are artificial, it tells us why the concern for justice and fairness in mediation is important throughout the mediation.

Mediators and commentators about the process have shown concern for substantive fairness and justice in mediation throughout its modern flowering over the last quarter century, but the issue has remained a somewhat shadowy presence on the edge of our collective thinking. Owen Fiss's widely cited challenge to alternative dispute resolution provides an example. His article, *Against Settlement*,²⁵ forcefully argues that alternative methods of dispute resolution permit stronger parties to take unfair advantage of weaker ones, and deprive the courts of their opportunity to articulate and enforce public norms. But, while asserting that alternative dispute resolution is antithetical to the sound rendition of justice, his argument is rather opaque about other ways that justice might or might not operate in mediation. More particularly, his account of alternative dispute resolution does not give us guidance on whether a mediator should inquire about the fairness or justice behind the settlement proposals that parties make, nor does it help us decide whether or when a mediator should suggest that the parties split the difference, or inquire into the fairness of such an action. Perhaps his position means that such issues are unimportant beside the potent questions of abuses of power or court articulation of

²⁵ Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

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norms. Conversely, perhaps it means that proper reparation and fair distribution may be appropriate justice questions for mediation, after all, but should not distract us from attending to the problems of disparities in power or the proper articulation of authoritative norms. The article does not say.

Moreover, even if we ignore the issues, they remain part of what mediators do. Much as we might like to hide fairness in the privacy of the parties' thoughts, and keep it out of the mediation room, it inevitably flows around and through mediation. It may become visible at certain points where mediators make choices about it, whether consciously or not, such as the student mediator who asked the parties about splitting the difference. It may also become visible if we step back and try to understand the mediation process from a distance. Judith Maute, for instance, in a frequently cited article setting out some of the basic values and conflicts of mediation, notes that mediators should only intervene to prevent unfairness in limited circumstances, when the unfairness has passed a certain threshold that requires action.²⁶ Her account suggests that the mediator will know by a kind of moral intuition when things have gone too far. The details, however, were not the subject of her article. This intuitive kind of reaction tells us that notions of fairness and justice are continually part of the mental framework within which mediators and the parties carry out their discussions and do their work. I suspect that her account states the views of many mediators. Mediators rely on their intuitive moral sense to identify substantial unfairness. When they see it, they may find some way to intervene, but they have no standard vocabulary or method to do so. When unfairness becomes manifest or troublesome in a mediation, we are not seeing the injection of new ideas or concerns that were not already there; we are simply seeing implicit conceptions being forced up into the realm of action and quasi-conscious thought.

Similarly, Ellen Waldman points out that when we pay attention to the role of norms in mediation, we can see them operating in three different ways.²⁷ Mediation sessions can be an opportunity to generate norms, as the parties work out the standards and terms for resolving their differences.²⁸ They can also be norm-educating,

²⁶ Judith L. Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 *GEO. J. LEGAL ETHICS* 503 (1991).

²⁷ Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 *HASTINGS L.J.* 703 (1997).

²⁸ See *id.* at 710-719.

as the mediators (or the parties themselves) bring into the session various norms used by social institutions external to the mediation, such as what the law provides, or what is normal and customary in a particular industry.²⁹ Finally, mediations can be norm advocating, when a mediator seeks to have the parties attend to norms that the mediator thinks are appropriate for the situation.³⁰ This is a very revealing and helpful characterization of how norms work in mediation. It reveals that concepts of fairness and justice, which are norms, operate in a variety of ways (such as generation, education, and advocacy) throughout mediation, even if we say that they should have no place in mediation.

Both Professor Maute's and Professor Waldman's analyses reveal the constant presence of ideas of fairness and justice in the background, but neither tells us how mediators should recognize when these moral issues require explicit attention or action by the mediator. In Maute's framework, when – and why – does a mediation session become so unfair that the mediator should intervene in a new way? In Waldman's framework, how does it come about that a mediation shifts from one in which the parties generate their own norms to one in which the mediator educates the parties about norms, and how does it shift again to one in which the mediator begins to advocate norms? Should mediators pay enough attention to the norms of fairness and justice in particular mediations to recognize and consciously control the shifts from generation, to education, to advocacy?

Thus, the objections to discussing fairness and justice in mediation do not make those issues go away. Refusing to discuss them merely keeps them hidden in a kind of conceptual background to the mediation, from where they sometimes intrude in shadowy, indirect ways, disguised as transitions or unexpected mediator interventions.

There is another, perhaps more important, reason why we should pay attention to fairness and justice in mediation and not overstate the objections to using these concepts. Fairness and justice are very important social values, closely bound to what we think of as a good social order. The ability of people to act fairly and with justice is an important virtue. Thus, it seems odd to flatly discard any concern for substantive fairness and justice when we substitute mediation for adjudication as our method to resolve disputes.

²⁹ See *id.* at 723-727.

³⁰ See *id.* at 742-745.

V. THE OBJECTIONS REBUTTED

The importance of finding the ways in which justice and fairness might work in mediation means that we should examine the objections with due care. None of them is sufficient to preclude all consideration of fairness.

A. Imposing the Mediator's Views

To deal with the risk of imposing the mediator's views on the parties, we need to distinguish the "is" from the "should," that is, separate the descriptive from the normative. Asking what the parties think is fair is a descriptive question; it does not tell the parties what they should think is fair, nor does it make a statement about action. It does not even tell them to act in accordance with their view of what is fair. Similarly, a mediator can describe his or her own view of fairness in the situation without being normative, without telling the parties that they should act in accordance with what the mediator thinks is fair.

Of course, the categories of "is" and "should" overlap and intertwine, particularly in matters of fairness and justice. If people agree that all should act in a fair and just manner, as I think most people do, then even a mere description of what someone thinks is fair implies how people should act. If a mediator asks about a party's views of fairness, the question might be understood as an implicit statement that the mediator thinks that the party's views are morally questionable or improper. If a mediator goes further and states his or her own views about what is fair in the situation, the parties might understand that statement as an implicit request that they act in the way the mediator thinks is most fair, substituting the mediator's views for their own.

I am not advocating that mediators should tell the parties what to do. The parties' freedom to decide what to do remains a paramount virtue of mediation. The task for mediators is to learn about the parties' views of fairness and justice, and sometimes even express their own views, in such a way that the parties remain responsible for thinking through and acting on their own ideas of what is fair and just. We can draw guidance about carrying out this task from two other tensions of professional practice: the evaluative/facilitative debate in mediation, and the moral dialogue issue in the practice of law.

The tension between simply learning about views of fairness, on the one hand, and telling parties how to act in light of them, on the other, belongs to the same family of tensions as the evaluative/facilitative debate in mediation. Leonard Riskin coined the terms “evaluative” and “facilitative” to describe the spectrum of different interventions mediators might use with the parties during mediation.³¹ The evaluative end describes the most intrusive, with the mediator giving the parties specific opinions, ranging from opinions about what the courts would do if the matter were to come to trial, to opinions about how proposals will work in the real world, and even to opinions about what is the right thing to do. His coinage produced a vigorous and widespread debate over the propriety of these extremes of intervention methods, and where between them mediators should draw the line.³² More recently, he has substituted the term “directive” to describe the ways a mediator can intervene.³³ That term captures quite precisely what we fear about a mediator’s discussion of fairness and justice; we worry that by asking about fairness and justice, or by stating his or her own views, the mediator will be “directing” the parties to act in accordance with the mediator’s views, rather than leaving the decision-making power in the parties’ hands.

No “right” resolution exists for this tension. The extent to which a mediator is directive in a mediation – or any specific part of the mediation – depends to a great degree on the mediator’s professional judgment about the specifics of the situation at hand, informed by the mediator’s respect for the parties’ autonomy and freedom of choice. Professor Riskin’s more recent formulation exposes just this point, for he notes that the degree of directiveness and possible intrusion on the parties’ decision-making extends over a wide variety of different issues that must be addressed in a mediation, including issues of process as well as issues of substance.³⁴ The same kind of judgment must guide how a mediator raises and discusses questions of fairness and justice. Because directiveness about fairness and justice is not categorically different from directiveness about the many other issues about which mediators must exercise judgment, no reason exists to preclude mediators from exercising similar judgment about how directive to be.

³¹ See Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7 (1996).

³² See Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 4, n.5 (2003).

³³ See *id.* at 32.

³⁴ See *id.* at 42-44.

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Even less reason exists to fear excessive directiveness in questions about fairness and justice than in other issues discussed by Riskin about which a mediator can be directive. A mediator's directive statements about what the law requires, or about what is "normally done" in similar situations, or about the financial implications of various proposals, are likely to carry substantial persuasive force if the parties are ignorant or inexperienced in those areas. The mediator's expertise can overwhelm the parties' judgment. But people usually have their own views about what is right and what is wrong, and about what is unfair or unjust. In being directive about these matters, the mediator would not be filling a knowledge gap or invoking any special expertise. He or she would instead be asking the parties to change their thinking, a notoriously difficult task.

The problem of mediator directiveness regarding fairness and justice is analogous to the problem that lawyers face in giving moral or ethical advice to their clients. Because they are agents for their clients, using their lawyerly skills to accomplish what their clients want, lawyers tend not to second-guess or intrude on their clients' moral attitudes. At the same time, lawyers are independent professional agents and have a moral responsibility for their actions. Ethical rules governing lawyers permit lawyers to advise their clients about the moral or ethical attributes of the clients' actions,³⁵ and the literature of legal ethics has struggled mightily with how to accommodate such tensions.³⁶ A more thorough review of the way legal ethics deals with these problems might be fruitful in elaborating on how mediators should deal with their analogous dilemmas. But even without such an analysis, the legal ethics literature tells us that lawyers can maintain their own moral understanding of their clients' actions, and can express their views to their clients, without controlling their clients, directing their clients' moral attitudes, or substituting their own moral standards for those of their clients.

Mediators have a kind of agency relationship with the parties that is in some respects analogous to lawyers' agency for their clients. Mediators are the parties' agents for the purpose of helping the parties find or develop a mutually acceptable way to resolve

³⁵ See American Bar Association, ABA Model Rules of Prof'l Conduct 2.1 (2003) ("In rendering advice [to a client], a lawyer may refer . . . to . . . moral, economic, social and political factors, that may be relevant to the client's situation.").

³⁶ See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); see also Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988).

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their conflict or dispute. Like lawyers, they use their skills to help the parties meet their own needs and goals. Unlike lawyers, whose primary responsibility is to one client, mediators cannot prefer one party over another. But they do have an ethical responsibility to help both parties together. As agents, mediators face the same problem that lawyers face in being independent moral agents while at the same time deferring to the moral and ethical views of their “clients.”

How lawyers manage the tension between deference to their clients’ views, on the one hand, and their responsibility to advise their clients about such matters, on the other, is still a matter of concern and discussion. There are no standard answers. Similarly, we should expect no pat answers for the question of how mediators should carry out their analogous task. In my view, the most promising approach lies in thinking about these issues as an occasion for a kind of dialogue, in which the mediator can express his or her views while understanding, acknowledging, and tolerating the differing views of the parties (to the extent those views are, in fact, differing). The interaction between the mediator and the parties on these issues becomes a kind of mutually respectful dialogue. The power to decide remains with the parties, not with the mediator.

An exchange of views about fairness and justice is easier to understand as a kind of mutually respectful dialogue if one understands moral reasoning as a process that lends itself to questioning, learning, and dialogue, rather than a process of logically commanding a correct result. Later in this article, I describe how a mediator might talk with the parties about fairness and justice, without intruding on the parties’ independent views and freedom of action.

B. Futility

It may indeed be true that the parties’ competing claims for justice and fairness produce a stalemate; they may have conflicting views that do not overlap and cannot be reconciled. But that is not a sufficient reason to keep the mediator from inquiring about such views. Substantive fairness will still be part of the process if the issues are articulated and discussed, even if the parties do not reach common ground on what was fair and what was not, or what a just result would be. In this, mediation differs from adjudication in a fundamental way. Adjudication assumes that there is only one cor-

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rect assessment of what happened in the past, and only one just resolution. Mediation, however, can consider justice without finding one right way. A simple inquiry into fairness and justice itself accomplishes the task of making the mediation more fair and more just, simply through the act of discussion and regardless of whether the parties reach agreement on the subject. There is no futility when the goal is not to reach agreement on these questions, but simply to get the parties and the mediator to examine them.

For many of the issues discussed in mediation, mediators do not need to get the parties to agree. The parties can finish the mediation disagreeing about how they feel, disagreeing about what happened in the past, or disagreeing about what the future will bring, yet still reach a resolution that meets their needs. The mediator's task can be to help the parties understand each other and their differences more clearly, and find a way to a satisfactory resolution despite, or in light of, those differences. When we accept that fairness in mediation is like these many other issues, and can in fact entail understanding and working with divergent views, without the need to reach a common agreed story about what is right, we can see how mediators can guide the parties through any intensified conflict created by a discussion of fairness.

Furthermore, whether the discussion of conflicting views of fairness would end in a stalemate or might lead to some alternate paths to resolution is difficult to tell in advance. As noted above in the story of the EEOC complainant with the big demand, a discussion of fairness may reveal a large group of actions that the party felt were unfair. Even if the parties remain stalemated on some of these, others may provide an opportunity for partial accommodations, explanations, and apologies.³⁷ Apologies, even as to only some of the issues, can constitute a form of reparative justice, correcting some aspects of the wrong that took place, whether or not they entirely resolve the matter. Discussion might also reveal ways to modify settlement terms in a mutually beneficial way.³⁸

³⁷ Mediators often try to multiply the number of issues the parties need to resolve, sometimes by breaking down the parties' expressed concerns into their constituent parts, to provide an opportunity for trading or "logrolling," and to provide a greater opportunity to provide some terms for each side to see as a gain for them. *See, e.g.*, Christopher R. Moore, *MEDIATION* 274, 278 (4th ed. 2003).

³⁸ For example, one party might come to understand that, even though what he did was correct and fair, the other party might have been unnecessarily hurt by how he did it, or the other person might have understandably seen it as unfair and been hurt by that, even though the "wrongdoer" would not act differently if he had it to do over again. The apology, which would be an apology of sympathy and partial responsibility, would correct some

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C. Intensifying Conflict

Arguing about competing claims of justice and fairness can indeed enmesh the parties in a more intense conflict. But mediators have the opportunity to moderate such conflict by using the same techniques they apply to other kinds of ingrained differences and strong feelings. Mediators expect the parties to come to the mediation with strong feelings, and are prepared to manage the resulting dynamics. When strong emotions overwhelm the parties' ability to talk to each other or to think clearly about what they want and how to get it, mediators can intervene in a variety of ways, such as taking a break to let the strong emotions dissipate, letting the parties "vent" by expressing themselves and then letting go of the intensity of their feeling, reflectively listening to the parties to let them know that they have been heard, or meeting separately with each party. Variations of these techniques could be used if discussions of fairness begin to elicit unproductive hostility, or if they go on for so long that they interfere with finding possible resolutions. Mediators might want to avoid discussions of fairness if they are somehow less capable of dealing with intense feelings that arise from competing claims of fairness than from other kinds of differences. But to make such a distinction discounts fairness and makes it a less important aspect of conflict than feelings. I know of no reason why feelings should be given such a privileged position over fairness among the tasks faced by mediators.

D. Protecting the Parties' Autonomy

Asking the parties to explain their views of fairness and justice does not intrude on their autonomy, so long as the mediator asks in the spirit of seeking information and clarity, and not with the purpose or effect to denigrate the parties or force them to change their views. The mediator can go further and engage in a discussion or mutual analysis of fairness without necessarily compromising the parties' autonomy. A mediator who disagrees with the parties about the fairness of what happened or the justice of possible resolutions does not necessarily intrude on the parties' autonomy simply because of the disagreement. When mediators face parties who

of the tear in the moral fabric between the parties, even if it did not resolve all of their differences.

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disagree with each other, as they usually do, they still expect that the parties will show some respect for each other. A mediator who engages in a discussion of fairness could do what he or she hopes the parties would do; maintain respect for the other's autonomy, even while expressing a different view.

Moreover, it denigrates and distorts the idea of fairness to treat it as an intensely private matter that must remain hidden. Ideas of fairness do not reside exclusively in the private thoughts of people. They are also a social phenomenon, something that people constantly share, test, and exchange with each other as part of normal social life. They belong to the community as well as to individuals. It misconstrues autonomy to imagine that it limits moral ideas to the inner, uncommunicative recesses of each separate person. In a way, a mediator enhances a party's autonomy by inviting a discussion of the fairness ideas that are part of the party's moral stance. Autonomy does not mean anomie.

To be sure, it is quite possible for a mediator to show insufficient respect for, or deference to, the parties' views of fairness and justice. Mediators may go too far if they denigrate the parties' views or attempt to substitute their views of fairness and justice for those of the parties. The task for mediators is how to engage in a discussion of fairness and justice without imposing such a substitution.

VI. HOW TO TALK ABOUT FAIRNESS AND JUSTICE

A. Rely on Stories More Than Logic

To bring fairness and justice into the mediation conversation, mediators need to find ways to articulate the topics, without imposing their own views. Imposing their views would strip the mediation of its hallmark respect for the parties' freedom of choice and turn the process into a kind of seat-of-the-pants arbitration. But how can mediators act without imposing?

Two conceptual moves are pertinent here. The first relates to how we understand moral reasoning. As Paul Tremblay explains in his article on casuistry,³⁹ we tend to think of moral reasoning as a kind of deductive logical process. We select first principles; we ap-

³⁹ See Paul R. Tremblay, *The New Casuistry*, 12 *GEO. J. LEGAL ETHICS* 489 (1999).

ply them to the facts; we reach the logically correct conclusion about what is right and what is wrong.⁴⁰ Thinking of moral reasoning in this way would make it difficult for mediators and parties to talk about these issues. Part of the conversation would have to dig down to first principles. Are the parties thinking like pure utilitarians, rule utilitarians, or deontologists? Does the mediator start from the same principles? If not, does the discussion turn to trying to justify the varying philosophical starting points that each bring to their analysis of fairness? More importantly, if the moral conclusions inescapably flow from the first principles by the force of logic, either the mediator or the party ends up having to abandon their commitment to logic and good sense, unless they can somehow figure out how to bring the other party around. That puts the mediator in a very difficult bind, either trying to control the outcome or feeling untrue to his or her own sense of fairness. No wonder mediators dislike talking about fairness and justice.

The bind, however, is not inevitable. Tremblay persuasively points out that this model of logical moral reasoning from first principles neither describes how we actually reason, nor how we should reason, about these things in ordinary life.⁴¹ Hearing ordinary people in mediations parsing moral logic as if they were philosophy professors would be quite remarkable. They do not do it. Perhaps mediators think that talk about fairness and justice has no place in mediation because they mistakenly assume that moral reasoning requires such logic chopping.

People should not have to reason about right and wrong in these formalistic ways. I will not repeat here Tremblay's elegant discussion of this point. Suffice it to say that the less formal moral reasoning he describes appears much more like ordinary conversation. It relies on examples, comparisons, and pertinent facts, rather than on grand logical schemes. It is a more fruitful way to examine, and come to decisions about, what is fair and what is right. This form of reasoning is called casuistry. Although casuistry has developed the connotation that it is a disingenuous and instrumental form of reasoning, used only to achieve undisclosed ulterior purposes, Tremblay argues, and I agree, that it can be used in an honest manner to reason out fairness or other moral issues.⁴²

Here is an example of reasoning about reparative justice that relies on factual distinctions and comparisons, rather than formal

⁴⁰ See *id.* at 491 n. 8.

⁴¹ See *id.* at 498-502.

⁴² See *id.* at 493 n.15.

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logical debate.⁴³ In the mediation of an employment discrimination claim, the discharged employee was insisting on payment from the respondent of at least one hundred thousand dollars. That amount was substantially more than the employee's annual salary or back pay award. The respondent had offered a substantial – but substantially smaller — amount in settlement, which the employee had refused. One of the co-mediators then told a story about her work as a lawyer. She said that she sometimes represented the parents of infants who died as a result of someone's wrongful conduct. She told the employee that the hardest thing she had to do in those cases was to tell the parents that, under the law, their infant's life was worth less than one hundred thousand dollars. After hearing this, the claimant lowered her demand and settled the case. While we do not know her reasoning, the comparison between the loss of a job, even with a discriminatory motive, and the loss of a child seemed to be a way to establish fairness.

The mediators in this example could have used a wide variety of stories and comparisons to help the employee think through what was fair reparation. Instead of a comparison with wrongful death cases, they might have used the “make whole” principle of employment discrimination law to set a measure of fair recompense. With this kind of comparison, a proposed settlement figure might seem unfairly large, or unfairly small, if it is substantially out of proportion to what the law would provide. They might have used common sense language of moral blame, as the mediator Eric Green did when he asked a claimant during the mediation of a dispute between a former employee and his former employer “How greedy can you get?”⁴⁴ Mediation need not limit its issues to legal claims. Using ordinary ideas of fairness, one could explore the ways in which the employee may have been treated unfairly, regardless of whether the employer violated the law. Such treatment might justify a moral argument for reparation, even if the legal claim seemed weak to non-existent. No meta-ethics tells mediators which measures of fairness are appropriate. They must choose. Their choices, including avoiding any comparisons that

⁴³ This story was told to me by Phil Goldman, the Mediation Program Coordinator at the EEOC in Newark, New Jersey. He was one of the co-mediators, but not the one who spoke about damage comparisons.

⁴⁴ Lavinia E. Hall, *Eric Green: Finding Alternatives to Litigation in Business Disputes*, in *WHEN TALK WORKS: PROFILES OF MEDIATORS* 299 (Deborah Kolb ed.1994). The apparent overbearing quality of the remark was moderated by the fact that both parties were represented in the mediation by counsel.

smack of unfairness, necessarily involve making choices about fairness and justice.

This move from formal logic to narrative makes available to the mediation all the varieties of fairness and justice that are important to the parties from their ordinary lives, unconstrained by what might be legally right or wrong. The types of unfair behavior that I speculated about in the story of the EEOC complainant may be explored through the parties' stories of what happened and what was wrong with it. Such stories pervade our social discourse and give meaning to events in our lives. The parties are "trained" to use such stories by simply living in the social world.⁴⁵ No formal training is required. The parties and the mediator can use these normal stories to find out what went wrong and to search for mutually acceptable ways to fix at least part of it.

The second conceptual move capitalizes on this way of looking at moral discourse to subtly change the moral relationship between the parties and the mediator. The relationship between the mediator and the parties can become more of a dialogue (or triologue) and less of a battle for command of the moral high ground. Each party to the discussion brings his or her own stories and interprets the stories of the others in light of his or her own experience. The comparisons and distinctions that form the vocabulary of this kind of moral reasoning have different weight and impact for each participant. The mediator and the parties have a greater opportunity to tolerate each other because, as noted above, giving credence to the different judgment of another does not require the abandonment of one's own judgment.

Paul Tremblay is helpful in this regard, as well. He addresses the analogous problem of moral conflict between lawyers and clients.⁴⁶ The problem of what lawyers should do when their moral judgments about a situation differ from those of their clients is a perennially difficult one. If lawyers secretly act on their own moral views, they abandon their duty of loyalty to their clients. If lawyers tell their clients that they will act in accordance with their own views, rather than those of the clients, they threaten their clients'

⁴⁵ See Jerome Bruner, *A Psychologist and the Law*, 37 N.Y.L. SCH. L. REV. 173, 176-77 (1992) (describing how we use narrative stories, often brief, "not only as a way of representing what happened, but to pass judgment on what happened. Without explicitly intending to, stories carry a moral in recounting what is taken for granted and what is taken as a breach. . ." and how people have been exposed to tens of thousands of such stories by the time they reach adulthood.).

⁴⁶ See Paul R. Tremblay, *Client-Centered Counseling and Moral Activism*, 30 PEPP. L. REV. 615 (2003).

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autonomy. If lawyers accede to their clients' views, and act accordingly, they have given up some of their own dignity as independent moral agents. Tremblay applies the casuistic method of moral reasoning to ameliorate the conflict. When the moral discussion takes place in terms of detailed stories and close attention to comparative facts, the moral conflicts become softer and more malleable. Many of the differences between lawyer and client, Tremblay notes, become differences in their understanding of the weight and meaning of pertinent facts.⁴⁷ Discussion of such differences puts lawyers and clients on a more equal footing in terms of moral reasoning. Their discussions need not become a winner-take-all battle for moral dominance.

In one respect, Tremblay's model for how lawyers can talk with their clients about their views of fairness is of limited applicability to mediation. For Tremblay, the subject of discussion becomes facts: The way to resolve the moral differences between lawyers and clients is to obtain agreement about morally relevant facts. That option, however, is usually not available in mediation. Mediation is not structured to develop a definitive account of contested facts. Instead, mediation works to identify, with some precision, those factual matters about which the parties agree, and about those which they disagree, and then to look for ways to construct an agreement without the need to reconcile the contested facts. Sometimes obtaining an agreement entails ignoring disputes of fact and building agreement over things not so intensely in dispute. Sometimes obtaining an agreement entails capitalizing on disputes of fact, particularly differing expectations about what will happen in the future. Finding the "true" facts might help in lawyer-client disputes, but is much less likely to do so when mediators' views differ from those of the parties.

Despite the limited usefulness for mediators of Tremblay's move to facts, Tremblay's model draws on a particular strength of mediation in another way. Tremblay's method helps protect a client's autonomy by allowing the lawyer to engage in moral dialogue with the client without requiring the client to act in accordance with the lawyer's moral views. When a mediator addresses the issues of fairness and justice, Tremblay's model will similarly allow the discussion to continue fruitfully without requiring that either party be dominant. Mediators are, or should be, particularly adept at helping parties structure their discussion so they can each have their say and be heard by the other, recognize their differences,

⁴⁷ *Id.*

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and still construct a plan of action that will resolve the dispute. To carry on a discussion of fairness and justice in which the mediator does not dominate the parties, mediators need to apply, to their own participation, the same careful listening, respect for the other, and withholding of judgment that they seek to have the parties use with each other.

B. Do the Other Things That Mediators Should Do Anyway

The foregoing section argues that mediators can bring fairness and justice ideas into the mediation without dominating the parties if the mediators use a method of moral reasoning that relies on close attention to the facts and stories that give those ideas meaning. Mediators can do other things, as well, to enhance the role of fairness and justice in mediation, things that may not seem so alien to the familiar ways that mediators do their work. Social science literature shows that when the parties show respect for each other, listen to each other, and show that they have listened to each other, parties tend to think that their mediation discussions, and the agreements themselves, are more fair.⁴⁸ Mediators seek to foster respect, listening, and being heard between the parties, simply for the sake of getting the parties to a good agreement. It is a bonus that such actions also enhance fairness.

These methods will not make mediations more just in the sense of providing objective determinations of who was right and who was wrong. Nor will they provide logically rigorous analysis of the fairness of the resolutions. It may only be one or more of the parties, and not the mediator, who thinks that a resolution is fairer. The mediation may end with the mediator disagreeing about the degree of fairness. But the parties' views about greater fairness are sufficient for us to conclude that the mediation process, guided by the mediator, has produced a fairer and more just result.

VII. CONCLUSION

This article examines how concerns for fairness and justice can become a more prominent and explicit part of the mediation pro-

⁴⁸ See Nancy A. Welsh, *Perceptions of Fairness in Negotiation*, 87 *MARQUETTE L. REV.* 753, 765-66 (2004).

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cess. Doing so requires mediators to pay attention to the instances and examples of reparative and allocative justice that peruse mediations, but which are seldom attended to. Mediators should try to swim in the deep end of the pool of contested issues. The objections to working with such questions in mediation – that mediators will try to impose their own moral views, that such discussion will not solve anything, that it will merely increase conflict between the parties, and that the act of discussion will unduly intrude upon the parties' autonomy – should not preclude mediators from doing so. The objections identify real risks, however, and mediators need to adjust their behaviors to prevent them from becoming problems. Making such questions a more prominent part of mediation becomes safer and more fruitful if mediators use the form of ethical reasoning called casuistry. This kind of ethical reasoning requires mediators and the parties to pay close attention to detailed facts, use stories to make moral sense of the matters in dispute, and tolerate the divergent moral views of others. Good mediators probably know how to do these things already, and use them in various forms in their mediations. They should understand that their attitudes and methods provide a sound way to work with competing ideas of fairness in the mediation.

Paying attention to fairness and justice will not eliminate the more familiar areas of moral conflict in mediation, such as the tension between the autonomy of the parties in mediation and harm they might cause to third parties who are unable to protect themselves, or the need to respond when one party tries to take unjust advantage of its superior bargaining power. I am not even sure that the approaches discussed in this article would be helpful for those conflicts. But failing to solve those conflicts should not detract from the need to pay more conscious attention to the ways in which reparative and allocative fairness work throughout the stuff of mediation. If we ignore such issues of fairness, they will operate unspoken and unrecognized in the background. We will fall victim to a sense of justice that we have not had a chance to criticize.⁴⁹

⁴⁹ I am indebted to my colleague John Leubsdorf for this image. He used it to assert the need to stay aware of the metaphors and analogies we use, so that we do not become victims of them.